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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79

MICHAEL CLEMENTE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

The Petitioner, Michael Clemente,* was indicted on June 14, 1979 for, among other things, five counts of evading income taxes in violation of Title 26 U.S.C. §7201 and four counts of knowingly making and signing false income tax returns in violation of Title 26 U.S.C. §7206(1).**

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* Petitioner is referred to as either Petitioner or Clemente.

** There is a superseding indictment number S-79 Cr 142 (LBS) which contains substantially the same tax violations, as the original indictment, in counts 200 through 209, except that the superseding violations of 26 U.S.C. 7201 omit the following phrase: "and by mailing and causing to be mailed . . ." A copy of the original tax counts are annexed as Appendix A. A copy of the superseding tax counts are annexed as Appendix B.

Clemente made a timely motion pursuant to Title 18 U.S.C. §3237(b), for the transfer of the trial of the tax counts to the United States District Court, Eastern District, which is the district in which he resided at the time of the alleged offense.*

The Government relying on its failure to use language in the indictment referring to "use of the mails", has taken the position that venue therefore lies under Title 18 U.S.C. §3237(a) and that Title 18 U.S.C. §3237(b) is inapplicable.

District Judge Leonard B. Sand of the United States District Court, Southern District of New York, upheld Clemente's mandatory right to the transfer requested and held that, even absent allegations of mailing in a superseding indictment, the statute involved [18 U.S.C. 3237(b)] is not ambiguous and that transfer of the tax counts is mandatory in this case because the offenses charged involve use of the mails.**

The Court of Appeals, Second Circuit, reversed the District Court's order transferring venue of the tax counts. It construed Title 18 U.S.C. §3237(b) "to apply, at most, to tax prosecutions that involve the use of the mails in the sense that a mailing, whether or not alleged in the indictment, is the basis on which the prosecution seeks to establish venue in a district other than the taxpayer's district of residence."*

* There is no question that Clemente resided in Kings County in the City and State of New York at the time of the alleged offense. Clemente submitted an affidavit, dated April 26, 1979, and stated among other things, upon information and belief, that his tax returns were mailed to the Internal Revenue Collector's office from the Eastern District of New York. A copy of Clemente's affidavit is annexed as Appendix C. Clemente renewed his motion in connection with the tax counts contained in the superseding indictment; transfer was granted.

** A copy of Judge Sand's decision is annexed as Appendix D.

Federal Statute Involved

Title 18 U.S.C. §3237

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate of foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from through, or into which such commerce or mail matter moves.

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: Provided that the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

* A copy of the Court of Appeals decision is annexed as Appendix E. Quote is on p. E14 of the decision.

Opinions Below

There is presently no official report of the opinion of the Court of Appeals for the Second Circuit which is annexed as an Appendix. The opinion of the United States District Court for the Southern District of New York is not yet officially reported and is also annexed as an Appendix.

Jurisdiction

The Court of Appeals issued its mandate on October 23, 1979 ordering that the trial of Clemente include the tax counts. Clemente's application to the Court of Appeals for a rehearing in banc was denied on January 4, 1980.* This petition for certiorari is being filed within 30 days of January 4, 1980. This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. §1254(1).

Questions Presented

1. Does the timely election by a defendant, pursuant to Title 28 U.S.C. §3237(b), for the transfer of the trial of tax violations specified therein, trigger a mandatory transfer of said trial to the United States District Court in the district wherein the defendant resided at the time of the offense.

2. Does the statutory language of Title 28 U.S.C. §3237(b) condition a defendant's right to elect a transfer of the trial of tax count violations on the government's reliance on use of the mails for venue purposes?

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*The order of the Court of Appeals denying the in banc rehearing is annexed as Appendix F.

Statement of the Case

Clemente has an absolute right to the transfer of the trial tax counts involved. Clemente's timely motion was not directed to the discretion of the District Court or consideration by the court of convenience, but was specifically mandated by statute. [Title 28, U.S.C. §3237(b)]

Section 3237(b) grants a limited choice of venue, under specifically enumerated circumstances. The statute unambiguously sets forth those circumstances, among others, as ". . . where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2) or (5) of such code. . . ."

Clemente properly invoked the statute and triggered his option to have the venue of the trial of the tax counts transferred to the Eastern District of New York.

It is obvious from reading the allegations set forth in the original indictment that the offenses charged in the counts in issue involve use of the mails.

The Court of Appeals' decision changes the clear language of §3237(b) which states, "notwithstanding subsection (a), section (b) is applicable", to mean "notwithstanding only the first paragraph of section 3237(a), subsection (b) is applicable." This result arises because the Government claims venue pursuant to the continuing offense provisions which are contained in the second paragraph of section 3237(a).

The Court of Appeals' construction of the language, "where an offense involves use of the mails", to include the added element that such use of the mail must also be the basis for establishing venue before subsection (b) is

applicable, is erroneous and deprived Clemente of his absolute right of transfer of the trial of the tax counts involved.

REASONS FOR GRANTING THIS WRIT

I.

Clemente Has an Absolute Right to Be Tried on the Counts of the Indictment Charging Him With Violations of Title 26 U.S.C. §§7201 and 7206(1) in the District in Which He Resided at the Time.

The position propounded by the Government in this case, that, because it does not claim reliance on use of the mails for venue purposes, the tax prosecutions, as set forth in the superseding indictment, do not involve use of the mails, has previously been raised and rejected by the United States District Court of Wisconsin, Eastern District, in the case of *United States* v. *Youse,* 387 F.Supp. 132.

The Court stated:

"Thus, the sole question before the Court is whether the 'offense involves use of the mails' within the meaning of §3237(b).

"The Government contends that because the indictment does not allege use of the mails and the use of the mails will not enter into the Government's proof of the offenses, § 3237(b) is inapplicable to the case. An allegation of the use of the mails in the indictment is not a condition of invocation of §3237(b). United States v. Dalitz, 248 F.Supp. 238 (S.D.Cal. 1965). *Nor must use of the mails be an element of the offense, the offense must merely 'involve' the use of the mails.* In United States v. Kimble, 186 F.Supp. 616 (S.D.N.Y. 1960), the Government similarly argued that the indictment was the sole source of information upon which the court may decide a motion under §3237(b). (emphasis supplied).

• • • • •

"Alternatively, the Government contends that a §3237 (b) transfer is available only if defendant used the mails in filing the return in question. Nothing in the language of the statute, its legislative history, or in subsequent cases arising under the statute indicates that Congress intended the phrase 'use of the mails' to apply only to the mailing of the returns for filing. Section 3237(b) requires only that the defendant use the mails to commit the acts proscribed by the statute alleged to have been violated in the indictment. In this case the indictment alleges a violation of §7201 of the Internal Revenue Code, 26 U.S.C. §7201. Section 7201 makes it an offense to attempt to evade or defeat the payment of the income tax. Thus, if defendant Youse used the mails to 'attempt to evade or defeat the income tax' he is entitled to a transfer to the district of his residence."

See also *United States* v. *Kimble,* 186 F.Supp. 616 (S.D. N.Y. 1960) where the Government contended that the option granted by §3237(b) could only be invoked where "the indictment alleges use of the mails and the residence of the defendant is in a district other than in which the indictment is found" (186 F.Supp. 617).

The Court in that case found the Government's contention obviously unsound it stated:

"The remaining contentions obviously are unsound. Charges of the nature here involved can be sufficiently

alleged without alleging either the means by which the acts were accomplished or the residence of the defendant at the time they were accomplished. These matters are not elements of these offenses and consequently they need not and are not likely to be included in the indictment or information." (id. at 618)

The Government takes opposite positions in two similar cases. One position, as here, that the meaning of the language, "involves use of the mails", does not include mailing if the government does not rely on such mailing for its chosen venue purpose; the other in *United States* v. *DeMarco,* 394 F.Supp. 611, 614-615 (D.D.C. 1975), in which the Government insisted that the meaning of "the language where the offense involves use of the mails" means mailing by the taxpayer of his return to the Internal Revenue Services.

Section 3237(b) has, for the 21 years since its inception, been consistently interpreted to be a mandatory venue right which is not subject to the alteration, whim or discretion of the prosecution or the courts. The interpretation was not challenged when this act was amended in 1966. As stated in Senate Report 1625, U.S. Code Cong. & Ad.News 89th Cong. 2nd Session (1976) 3676 at 3687:

"Section 3237(b) of title 18 of existing law provides that with respect to certain crimes described in the Internal Revenue Code (but not including crimes described in §7203) where an offense involves use of the mails and where prosecution is begun in a judicial district other than the district in which the defendant resides, he may, upon timely motion filed in the district in which the prosecution is begun, elect to be

tried in the district in which he was residing at the time the alleged offense was committed." *

Even though some of the transfers granted have not always been judicially economical the courts have uniformly recognized the absolute right to the transfer mandated by §3237(b). *United States* v. *Rosenberg,*** 226 F.Supp. 238 (S.D.Cal. 1965), *United States* v. *DeMarco,* 394 F.Supp. 611 (D.D.C. 1975) petition for mandamus denied without opinion.

There have even been transfers when the distances between the districts have been minimal. In *United States* v. *Kimble* (supra) the transfer was, as was sought in the instant case, from the United States Southern District of New York to the United States Eastern District of New York.

In the case of *United States* v. *Wortman,* 26 F.R.D. 183, 193 (E.D. Ill. 1960) the court transferred the tax counts from the Eastern District of Illinois in East St. Louis to the Eastern District of Missouri in St. Louis.

The *Wortman* indictment involved several defendants in a multi-count indictment, among which were substantive in-

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* One would think that if there were any merit to the prosecution's position it would have over the years found its way into some reported decision. That evokes the observation made by the United States Supreme Court in *Francis* v. *Southern Pacific,* 1948, 335 U.S. 445 at 450.

> "The long and well settled construction" of an act, plus its re-enactment, without change of "the established interpretation" are "most persuasive indications" that the judicial instruction "has become part of the warp and woof of the legislation.".

** In the *Rosenberg* case the court held that a trial of co-defendants charged with tax fraud with respect to the same return must be transferred to different districts for separate duplicative trials.

come tax violations and a conspiracy to violate the tax laws. In response to a motion to transfer venue pursuant to §3237(b), the Court transferred the substantive tax count violations of the individuals and retained jurisdiction of the conspiracy count in the forum of original jurisdiction.

See also *United States* v. *Tarnopol,* 561 F.2d 466, 469 (3rd Cir. 1977) which involved an 86-count, seven defendant indictment charging mail fraud and other crimes; the Court transferred tax evasion counts against one defendant from Newark, New Jersey to the Southern District of New York.*

Even considerations of judicial economy must give way to the mandate of the statute involved. In *United States* v. *Turkish,* 458 F.Supp. 874 (D.C. S.D.N.Y. 1978) the District Court recognized a defendant's absolute right to a transfer under §3237(b) although that particular case did not involve a tax violation encompassed within §3237(b). The court stated in footnote 12 at page 800:

> ". . . In *United States* v. *Youse* the Court held that 'considerations of convenience' do not apply to a §3237(b) transfer. However, the conclusion of the court in Youse was based on the mandatory application of §3237(b) to violations enumerated in §3237(b). . . ."

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* See also *United States* v. *Youse,* 387 F.Supp. 132 (D.D.Wis. 1975) which involved a multi-count, multi-defendant indictment wherein one defendant moved for a §3237(b) transfer, the Court stated:

> ". . . A motion under §3237(b) is not directed to the court's discretion, but rather Congress intended that the defendants be given an absolute right to be tried for alleged violations enumerated in §3237(b) in the district of their residence regardless of considerations of convenience." (citations omitted)

In accord see also *United States* v. *Osterer,* 458 F.Supp. 540 (D.C. S.D.N.Y. 1978), *United States* v. *Wortman* (supra).

The Court of Appeals, Second Circuit, in *United States* v. *Slutsky,* 487 F.2d 832 (2nd Cir. 1973) cert. denied 416 U.S. 937 (1974), although not dealing specifically with a §3237(b) motion, also recognized a defendant's right to be tried in the district in which he resided at the time of the alleged offense where the acts alleged were committed in another district. In footnote numbered 9 at page 839 of its decision, the Court states:

> "We further note the absence of any prejudice to appellants as the result of venue in the Southern District. Appellants do not claim that the prosecution there rather than in the Northern District created any difficulty in obtaining witnesses or documents, or indeed that any additional expense was incurred. *Further, under 18 U.S.C. §3237(b) a person charged with violations of 28 U.S.C. §§7201 and 7206(1) may 'elect to be tried in the district in which he was residing at the time the alleged offense was committed. In this case, that was the Southern District. We surmise that by bringing the action in the Southern District in the first instance the Government avoided a likely motion to transfer under §3237(b).*" (Emphasis added)

The question of venue is of constitutional dimension. In *United States* v. *Candella,* 487 F.2d 1223, 1227 (2nd Cir. 1973) cert. denied 415 U.S. 977, the Court said "while the question of whether the trial is conducted almost literally at one end of the Brooklyn Bridge or the other might seem to be a quibble, questions of venue in a criminal case are of constitutional concern."

Clemente's constitutional right to a transfer of the trial of the tax counts involved has been violated.

II.

The Language of Title 18 U.S.C. §3237(b) Is Not Ambiguous; Congressman Preston's Comments Are Not Dispositive of Legislative Intent.

The Court of Appeals attempted to ground its decision on the legislative history of Title 18 U.S.C. §3237(b) and cited as authority for its decision the following comment by Congressman Prince H. Preston, who introduced the bill, [H.R. 8252, 85th Cong. 1st Sess. (1957), the amended bill H.R. 8252, 104 Cong. Rec. 13064 (1958) eventually became Title 18 U.S.C. §3237(b)], "the bill would not cover situations where the use of the mails is not an ingredient of the offense charged."

Although the Court of Appeals recognized that the quoted comment was made in reference to the original bill,* which proposed that venue be solely in the district of the taxpayer's residence and did not give the taxpayer an option to transfer as did the final version in the amended bill, H.R. 8252, 104 Cong. Rec. 13064 (1958), it still attached great significance to his statement and considered it applicable because the key phrase, "involves use of the mails", was identical in both versions.

The Court of Appeals overlooked or ignored the true significance of the quoted comment.

During discussions in Congress concerning the bill, the Committee reports were primarily concerned with the problem of distances. H.R. Rep. No. 1890, 85th Cong. 2nd Sess. 1-2 (1958), reprinted in (1958) U.S. Code Cong. and Ad. News 3261, 3262 stated:

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* Footnote 5 of the Court of Appeals' decision; Appendix E.

> "Testimony before a Subcommittee of the Committee on the Judiciary revealed that under current procedures, defendants in certain tax-evasion and tax-fraud cases are often prosecuted in a judicial district substantially distant from the district in which they reside. This causes a heavy burden under them which is more appropriately and more easily borne by the prosecution.
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> • • •
>
> "The committee is of the opinion that too frequently prosecutions are not brought in the defendants' home districts but rather in the district most convenient to the district director of internal revenue. Often that district may be a considerable distance from the defendant's home."

The distances discussed by the Congressman varied from great distances in Texas to intermediate distances in Georgia and to minor distances between Washington, D.C. and Baltimore, Maryland. There were also comments that distances would not be a problem in California or in New York. [Hearings on H.R. 8252 before Subcommittee No. 4 of the House Committee on the Judiciary, 85th Cong. 2nd Sess. 11, 12, 15, 16, 27 (Apr. 25, 1958) (unpublished)].

After deliberation, both Congressional Committees considering the bill recommended the optional transfer without any geographic or distance limitations which would apply to all defendants:

> "Therefore, the committee is of the view that the defendant should have the right to be tried in the district in which he resided at the time the alleged offense was committed, if he so chooses, and that this should not be a matter of discretion."

(H.R. Rep. No. 1890 supra at 2; 3 Rep. No. 1952 supra at 2.)

The statute as enacted certainly does not condition the defendant's absolute right to the transfer granted on the Government's choice of venue. Section 3237(b) states that the defendant has the option to transfer venue whenever the offense is described in one of these sections, "*whether or not the offense is also described in another provision of law.*" (emphasis supplied)

The defendant's option is not contingent on the Government's reliance on mailing to establish venue.

Congressman Preston's remarks* were clearly applicable only to the first version of the bill which was questioned by the Treasury Department as constitutionally flawed because of the mandatory venue provision.**

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* At the time of Congressman Preston's remarks, H.R. 8252 provided that where an offense involves use of the mails "the offense may be prosecuted (1) *only* in the district in which the defendant was residing at the time the offense was committed if such mail matter has moved through the district. 104 Cong.Rec. 13064 (1958).

** Letter from Dan Throop Smith, Deputy to the Secretary, to Hon. Emanuel Cellar (April 23, 1958) reprinted in S.Rep.No. 1952, 85th Cong. 2nd Sess. 4, 1958, U.S.Code Cong. & AD. News 3201. The Treasury Department letter pointed out that:

"Article III, §2, clause 3, and the sixth amendment of the Constitution secure to persons accused of crimes the right to trial in the State and District in which a crime has been committed. It is not clear that, in some instances, the proposed legislation does not contravene these provisions. Indeed, in some instances, venue would seem to be laid in the district in which the accused resides rather than that in which the unlawful act was performed. Consequently, there is a possibility that the proposed legislation would be held null and void with respect to a crime not shown to have been committed in the judicial district of the defendant's residence and in which district the indictment has been returned under the authority of such legislation."

The committees' discussions contained no other elaboration of the interpretation of the words, "involves use of the mails", except to maintain that the bill permitted defendant the option to transfer to his home district the trial of certain offenses with the statement that the offenses covered involve the use of the mails to commit the acts described in §§7201 and 7206(1), (2) and (5). (H.R. Rep. No. 1890, 85th Cong. 2nd Sess. 1 (1958); U.S. Code Cong. and A.D. No. 3261, 3262 and S. Rep. No. 1952 (1958), 85th Cong. 2d Sess. 1 (1958), U.S. Code Cong. and Ad. News 3261, 3262.)

Congressman Preston's other statements surrounding his one comment quoted by the Court of Appeals clearly demonstrate his statement as referring solely to the first version of his bill:

"[T]his bill, H.R. 8252, as drafted would provide that where the use of the mails is an ingredient of an offense charged under the sections of the Internal Revenue Code of 1954 as specified in the bill, the defendant *must* be prosecuted in the district in which he resides, *if the mail matter involved has passed through that district.*

"The bill would not cover situations where the use of the mails is not an ingredient of the offense charged. *If t* [*sic*] *the bill attempted to cover such situations, by requiring tha* [*sic*] *defendants be prosecuted in the district of their residence,* although no part of the offense charged occurred there, *the bill would be of doubtful constitutionality in view of the sixth amendment of the Constitution.*" Hearings, supra at 6 (emphasis added), see also id. at 3-6, 25-26.

The District Court in *United States* v. *DeMarco,* 394 F.Supp. 611 (D.C.D.C. 1975) was confronted with the same

arguments and quotations from Congressman Preston as presented by the Government in this case. The District Court in that case stated:

> "While it is true that Congressman Preston seemed concerned primarily with the tax problems of some of his Savannah constituents who mailed their income tax returns from their homes in Savannah and who, when indicted, would under then existing law be tried in the home district of the collector namely, Atlanta, the section however, is not limited to the illustrations given by Mr. Preston. It is considerably broader in its scope than the specific cases to which Mr. Preston referred (at p. 616)."

The Court in the *DeMarco* case went further and held at page 617:

> "From the indictment itself, as well as the plain language of §3237 of Article 18, it appears that Mr. Newman is entitled to be tried in the district of his residence."

For the Government to prevail ultimately on this question would render the intention of §3237(b) a nullity. By careful drafting of an indictment the Government could effect a result which Title 18 U.S.C. §3237(b) was intended to halt: the prosecution of specified violations in districts other than the district in which a defendant resides.

With the elimination of the mention of mailing and no ostensible reliance thereon by the Government for venue purposes a defendant could be prosecuted in a district far from his residence if any act of his could be arguably claimed to be in furtherance of the offense.

The Court of Appeals' expressed concern for the convenience of witnesses results in a complete about-face of

prior decisions. If a taxpayer were to be on vacation in California and falsify a hotel record to justify a business deduction on his return filed by mailing in his home city of Atlanta and the Government did not rely on use of the mails as a basis for venue, that taxpayer could be prosecuted in California under the Court of Appeals interpretation.

Such a result would be so topsy-turvy as to be ridiculous. In its concern for what might happen in a multi-defendant indictment, the Court of Appeals has overlooked the basic concept that joinder of defendants is always for the convenience of the Government. The effect is that convenience of the Government eventuates in destruction of a defendant's right to be tried near his home.

CONCLUSION

The Court of Appeals' decision is at odds with two Circuit Courts of Appeals on the heretofore well established right of transfer of venue and is in conflict with every other decision which has dealt with a timely brought §3237(b) motion.

The indictment (the Government's concessions) and the defendant's statements clearly demonstrate that the tax offsenses charged "involve use of the mails."

Respectfully submitted,

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APPENDIX

APPENDIX A

Tax Counts of Indictment 79 Cr. 142

The Relevant Counts of the Indictment

Counts two hundred thirty-two (232) through and including two hundred forty-one (241.

COUNT TWO HUNDRED AND THIRTY-TWO

The Grand Jury further charges:

On or about the 15th day of April, 1974, in the Southern District of New York and elsewhere, MICHAEL CLEMENTE, the defendant, who during the calendar year 1973 was married, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the joint income tax due and owing by himself and his wife to the United States of America for the calendar year 1973, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed a false and fraudulent joint income tax return on behalf of himself and his wife, which was filed with the Internal Revenue Service and which stated that their joint taxable income for said calendar year was $15,375 and that the amount of income tax due and owing thereon was $3,075, whereas their joint taxable income for the said calendar year was at least $190,375 upon which an income tax of at least $70,193 was due and owing to the United States of America.

(Title 26, United States Code, Section 7201).

COUNT TWO HUNDRED AND THIRTY-THREE

The Grand Jury further charges:

On or about the 15th day of April, 1974, in the Southern District of New York, MICHAEL CLEMENTE, the defendant, unlawfully, wilfully and knowingly did make and subscribe a joint United States Income Tax Return, Form 1040, for the calendar year 1973, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service and which he did not believe to be true and correct as to a material matter, to wit, the omission of at least $175,000 from his reported 1973 adjusted gross income of $20,375.

(Title 26, United States Code, Section 7206(1).

COUNT TWO HUNDRED AND THIRTY-FOUR

The Grand Jury further charges:

On or about the 15th day of April, 1975, in the Southern District of New York and elsewhere. MICHAEL CLEMENTE, the defendant, who during the calendar year 1974 was married, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the joint income tax due and owing by himself and his wife to the United States of America for the calendar year 1974,

by preparing and causing to be prepared,, by signing and causing to be signed, and by mailing and causing to be mailed a false and fraudulent joint income tax return on behalf of himself and his wife, which was filed with the Internal Revenue Service and which stated that their joint taxable income for said calendar year was $13,960 and that the amount of income tax due and owing thereon was $2,750, whereas their joint taxable income for the said calendar year was at least $188,960 upon which an income tax of at least $103,362 was due and owing to the United States of America.

(Title 26, United States Code, Section 7201).

COUNT TWO HUNDRED AND THIRTY-FIVE

The Grand Jury further charges:

On or about the 15th day of April, 1975, in the Southern District of New York, MICHAEL CLEMENTE, the defendant, unlawfully, wilfully and knowingly did make and subscribe a joint United States Income Tax Return, Form 1040, for the calendar year 1974, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service and which he did not believe to be true and correct as to a material matter, to wit, the omission of at least $175,000 from his reported 1974 adjusted gross income of $18,900.

[Title 26, United States Code, Section 7206(1)]

COUNT TWO HUNDRED AND THIRTY-SIX

The Grand Jury further charges:

On or about the 15th day of April, 1976, in the Southern District of New York and elsewhere, MICHAEL CLEMENTE, the defendant, who during the calendar year 1975 was married, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the joint income tax due and owing by himself and his wife to the United States of America for the calendar year 1975, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed a false and fraudulent joint income tax return on behalf of himself and his wife, which was filed with the Internal Revenue Service and which stated that their joint taxable income for said calendar year was $12,400 and that the amount of income tax due and owing thereon was $2,300, whereas their joint taxable income for the said calendar year was at least $193,400 upon which an income tax of at least $106,366 was due and owing to the United States of America.

(Title 26, United States Code, Section 7201).

COUNT TWO HUNDRED AND THIRTY-SEVEN

The Grand Jury further charges:

On or about the 15th day of April, 1976, in the Southern District of New York, MICHAEL CLEMENTE, the defendant, unlawfully, wilfully and knowingly did make and subscribe a joint United States Income Tax Return, Form 1040, for the calendar year 1975, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service and which he did not believe to be true and correct as to a material matter, to wit, the omission of at least $181,000 from his reported 1975 adjusted gross income of $18,000.

[Title 26, United States Code, Section 7206(1)].

COUNT TWO HUNDRED AND THIRTY-EIGHT

The Grand Jury further charges:

On or about the 15th day of April, 1977, in the Southern District of New York and elsewhere, MICHAEL CLEMENTE, the defendant, who during the calendar year 1976 was married, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the joint income tax due and owing by himself and his wife to the United States of America for the calendar year 1976, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be

mailed a false and fraudulent joint income tax return on behalf of himself and his wife, which was filed with the Internal Revenue Service and which stated that their joint taxable income for said calendar year was $19,400 and that the amount of income tax due and owing thereon was $3,999, whereas the joint taxable income for the said calendar year was at least $200,400 upon which an income tax of at least $110,871 was due and owing to the United States of America.

(Title 26, United States Code, Section 7201).

COUNT TWO HUNDRED AND THIRTY-NINE

The Grand Jury further charges:

On or about the 15th day of April, 1977, in the Southern District of New York, MICHAEL CLEMENTE, the defendant, unlawfully, wilfully and knowingly did make and subscribe a joint United States Income Tax Return, Form 1040, for the calendar year 1976, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service and which he did not believe to be true and correct as to a material matter, to wit, the omission of at least $181,000 from his reported 1976 adjusted gross income of $25,000.

[Title 26, United States Code, Section 7206(1)].

COUNT TWO HUNDRED AND FORTY

The Grand Jury further charges:

On or about the 15th day of April, 1978, in the Southern District of New York and elsewhere, MICHAEL CLEMENTE, the defendant, who during the calendar year 1977 was married, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the joint income tax due and owing by himself and his wife to the United States of America for the calendar year 1977, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed a false and fraudulent joint income tax return on behalf of himself and his wife, which was filed with the Internal Revenue Service and which stated that their joint taxable income for said calendar year was $17,700 and that the amount of income tax due and owing thereon was $1,965, whereas the joint taxable income for the said calendar year was at least $210,700 upon which an income tax of at least $113,950 was due and owing to the United States of America.

(Title 26, United States Code, Section 7201).

COUNT TWO HUNDRED AND FORTY-ONE

The Grand Jury further charges:

On or about the 15th day of April, 1978, in the Southern District of New York, MICHAEL CLEMENTE, the defendant, unlawfully, wilfully and knowingly did make and subscribe a joint United States Income Tax Return, Form 1040, for the calendar year 1977, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service and which he did not believe to be true and correct as to a material matter, to wit, the omission of at least $193,000 from his reported 1977 adjusted gross income of $17,700.

[Title 26, United States Code, Section 7206(1)].

U-109

COUNT TWO HUNDRED

The Grand Jury further charges:

On or about the 15th day of April, 1974, in the Southern District of New York and elsewhere, MICHAEL CLEMENTE, the defendant, who during the calendar year 1973 was married, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the joint income tax due and owing by himself and his wife to the United States of America for the calendar year 1973, by preparing and causing to be prepared, by signing and causing to be signed a false and fraudulent joint income tax return on behalf of himself and his wife, which was filed with the Internal Revenue Service and which stated that their joint taxable income for said calendar year was $15,375 and that the amount of income tax due and owing thereon was $3,075, whereas their joint taxable income for the said calendar year was at least $190,375 upon which an income tax of at least $70,193 was due and owing to the United States of America.

(Title 26, United States Code, Section 7201.)

COUNT TWO HUNDRED AND ONE

The Grand Jury further charges:

On or about the 15th day of April, 1974, in the Southern District of New York, MICHAEL CLEMENTE, the defendant, unlawfully, wilfully and knowingly did make and subscribe a joint United States Income Tax Return, Form 1040, for the calendar year 1973, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service and which he did not believe to be true and correct as to a material matter, to wit, the omission of at least $175,000 from his reported 1973 adjusted gross income of $20,375.

(Title 26, United States Code, Section 7206(1).)

U-109

COUNT TWO HUNDRED AND TWO

The Grand Jury further charges:

On or about the 15th day of April, 1975, in the Southern District of New York and elsewhere, MICHAEL CLEMENTE, the defendant, who during the calendar year 1974 was married, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the joint income tax due and owing by himself and his wife to the United States of America for the calendar year 1974, by preparing and causing to be prepared, by signing and causing to be signed a false and fraudulent joint income tax return on behalf of himself and his wife, which was filed with the Internal Revenue Service and which stated that their joint taxable income for said calendar year was $13,960 and that the amount of income tax due and owing thereon was $2,750, whereas their joint taxable income for the said calendar year was at least $188,960 upon which an income tax of at least $103,362 was due and owing to the United States of America.

(Title 26, United States Code, Section 7201.)

COUNT TWO HUNDRED AND THREE

The Grand Jury further charges:

On or about the 15th day of April, 1975, in the Southern District of New York, MICHAEL CLEMENTE, the defendant, unlawfully, wilfully and knowingly did make and subscribe a joint United States Income Tax Return, Form 1040, for the calendar year 1974, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service and which he did not believe to be true and correct as to a material matter, to wit, the omission of at least $175,000 from his reported 1974 adjusted gross income of $18,960.

(Title 26, United States Code, Section 7206(1).)

COUNT TWO HUNDRED AND FOUR

The Grand Jury further charges:

On or about the 15th day of April, 1976, in the Southern District of New York and elsewhere, MICHAEL CLEMENTE, the defendant, who during the calendar year 1975 was married, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the joint income tax due and owing by himself and his wife to the United States of America for the calendar year 1975, by preparing and causing to be prepared, by signing and causing to be signed a false and fraudulent joint income tax return on behalf of himself and his wife, which was filed with the Internal Revenue Service and which stated that their joint taxable income for said calendar year was $12,400 and that the amount of income tax due and owing thereon was $2,300, whereas their joint taxable income for the said calendar year was at least $193,400 upon which an income tax of at least $106,366 was due and owing to the United States of America.

(Title 26, United States Code, Section 7201.)

COUNT TWO HUNDRED AND FIVE

The Grand Jury further charges:

On or about the 15th day of April, 1976, in the Southern District of New York, MICHAEL CLEMENTE, the defendant, unlawfully, wilfully and knowingly did make and subscribe a joint United States Income Tax Return, Form 1040, for the calendar year 1975, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service and which he did not believe to be true and correct as to a material matter, to wit, the omission of at least $181,000 from his reported 1975 adjusted gross income of $18,000.

(Title 26, United States Code, Section 7206(1).)

COUNT TWO HUNDRED AND SIX

The Grand Jury further charges:

On or about the 15th day of April, 1977, in the Southern District of New York and elsewhere, MICHAEL CLEMENTE, the defendant, who during the calendar year 1976 was married, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the joint income tax due and owing by himself and his wife to the United States of America for the calendar year 1976, by preparing and causing to be prepared, by signing and causing to be signed a false and fraudulent joint income tax return on behalf of himself and his wife, which was filed with the Internal Revenue Service and which stated that their joint taxable income for said calendar year was $19,400 and that the amount of income tax due and owing thereon was $3,999, whereas the joint taxable income for the said calendar year was at least $200,400 upon which an income tax of at least $110,871 was due and owing to the United States of America.

(Title 26, United States Code, Section 7201.)

COUNT TWO HUNDRED AND SEVEN

The Grand Jury further charges:

On or about the 15th day of April, 1977, in the Southern District of New York, MICHAEL CLEMENTE, the defendant, unlawfully, wilfully and knowingly did make and subscribe a joint United States Income Tax Return, Form 1040, for the calendar year 1976, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service and which he did not believe to be true and correct as to a material matter, to wit, the omission of at least $181,000 from his reported 1976 adjusted gross income of $25,200.

(Title 26, United States Code, Section 7206(1).)

U-109

COUNT TWO HUNDRED AND EIGHT

The Grand Jury further charges:

On or about the 15th day of April, 1978, in the Southern District of New York and elsewhere, MICHAEL CLEMENTE, the defendant, who during the calendar year 1977 was married, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the joint income tax due and owing by himself and his wife to the United States of America for the calendar year 1977, by preparing and causing to be prepared, by signing and causing to be signed a false and fraudulent joint income tax return on behalf of himself and his wife, which was filed with the Internal Revenue Service and which stated that their joint taxable income for said calendar year was $17,700 and that the amount of income tax due and owing thereon was $1,965, whereas the joint taxable income for the said calendar year was at least $210,700 upon which an income tax of at least $113,950 was due and owing to the United States of America.

(Title 26, United States Code, Section 7201.)

APPENDIX C

Michael Clemente's affidavit dated April 26, 1979.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA : 79 Cr. 142 (I.R.)

-v- : AFFIDAVIT

MICHAEL CLEMENTE, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - -X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MICHAEL CLEMENTE, being duly sworn, says:

1. I submit this affidavit and the statements contained herein only for the purposes of my pending application pursuant to 18 U.S.C. 3237(b) for a transfer of the trial of Counts 232 through and including 241, of the indictment, to the Eastern District of the United States District Court.

2. The memorandum of law submitted in support of my application clearly sets forth the allegations in the indictment which charge me with, among other things, "mailing, and causing to be mailed a false and fraudulent joint income tax return."

3. The allegations of the indictment, together with the admissions of the government in its memorandum of law, and the admission by Michael Devorkin in his undated affidavit all clearly demonstrate, without question, that the Counts of the indictment in issue involve use of the mails.

> "To be sure, the returns in question may have been ultimately filed through the use of the mails." (p.2, government's memorandum of law)
>
> * * * *
>
> "Here, of course, the returns were mailed or delivered for filing purposes to the Eastern District of New York where Mr. Clemente resides. (p.4, government's memorandum of law)(underling

> "All the aforementioned returns were prepared in the firm's office (Finkelstein, Goldstein and Rick, a certified public accounting firm) in Manhattan and then mailed to the defendant Clemente in Brooklyn." (sic) (Parenthesis supplied from another portion of said affidavit) (Devorkin's affidavit)

4. I have been advised by counsel that to require me to indicate my use of the mails in the commission of an alleged crime is a violation of my constitutional rights.

5. Without waiving any of my constitutional rights and based upon information and belief, I believe that the income tax returns for the years involved were mailed to the Internal Revenue Collector's office from the Eastern District of the United States District Court of New York

Sworn to before me this
4th day of April, 1979

RONALD A. STRACI
Notary Public, State of New York
No. 3868825
Qualified in New York County
Commission Expires March 30, 1981

Michael J. Clemente
MICHAEL CLEMENTE

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By J. McMahon
Deputy Clerk

APPENDIX D

Judge Leonard B. Sand's opinion U.S. D.C.S.D.

THE COURT: This is a motion brought by the defendant, Michael Clemente, pursuant to Section 3237 of Title 18 for an order directing that Counts 232 through and including 241 of Indictment 79 Cr. 142 be transferred to the District in which the defendant was residing at the time the alleged offenses were committed, which District would be the Eastern District of New York.

The motion is granted. The Court must deal with the statute as it has been enacted by Congress and not as it might have been enacted, or perhaps even as the Government urges, should have been enacted, to meet solely the particular instances of hardship before the Congress when it was considering adoption of the statute, or as it might have been enacted to avoid hostile unintended or untoward consequences.

The statute, in essence, gives to the defendant an election to be tried in the District in which he was residing at the time the alleged offense was committed, where an offense described in Section 7201 or 7206, 1, 2, or 5 of the Internal Revenue Code, "involves use of the mails."

The present indictment in its filing counts alleges a use of the mails. Even if there were no such allegation, and we note from the Government's representation that it intends to obtain a superseding indictment deleting these allegations, the statute has been held to be applicable even absent such allegations if the mail was in fact involved in the offense.

Here the defendant Michael Clemente has filed an affidavit in which he states, in part:

"Without waiving any of my constitutional rights and based upon information and belief, I believe that the income tax returns for the years involved were mailed to the Internal Revenue Collector's office from the Eastern District of the United States District Court of New York."

I believe that is somewhat garbled, but I believe the intent of the affidavit is clearer.

The Government has eloquently argued that the statute goes far beyond its intended purpose and may

lead to inequitable and indeed perhaps absurd results. It would read the statute to be applicable only where the use of the mails is the sole predicate of venue. We assume that venue lies in either this District because of the other acts allegedly occurring in this District, or in the Eastern District of New York. The question is whose choice of venue is to govern, and Congress perhaps too broadly and without consideration of all the consequences has stated where the offense "involves use of the mails," a very broad term, the choice rests with the defendant.

We believe that the statute is mandatory and unambiguous.

We do not find that the legislative history, which we have reviewed, is as persuasive for the Government's position as the Government contends, but, in any event, we agree with the District Court which reached a conclusion in accord with that of this Court that one would resort to the legislative history only if the statute were ambiguous, as it is not. Even if one were to find the statute to be ambiguous, we are dealing here in the context of the criminal law and ambiguities would be resolved in favor of the defendant.

Of course, Congress was impressed with and had other instances in mind in which the application of the statute

caused a hardship to the defendant far greater than would be involved in requiring Mr. Clemente to go to trial on this side of the East River, but Congress has imposed no geographic or mileage limitation nor has Congress limited the application of the statute to instances in which the sole predicate for venue was the use of the mail.

Accordingly, the motions are granted. Settle order.

APPENDIX E

Opinion of the Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1422—August Term, 1978.

(Argued July 18, 1979 Decided October 22, 1979.)

Docket No. 79-3051

In re UNITED STATES OF AMERICA,

Petitioner,

UNITED STATES OF AMERICA,

—v.—

MICHAEL CLEMENTE,

Defendant.

Before:

VAN GRAAFEILAND, NEWMAN and KEARSE,
Circuit Judges.

Petition by the United States for a writ of mandamus directing the United States District Court for the Southern District of New York (Hon. Leonard B. Sand, Judge) to vacate an order transferring prosecu-

tion of income tax offenses to the Eastern District of New York pursuant to 18 U.S.C. § 3237(b).

Petition granted and writ of mandamus issued.

MICHAEL S. DEVORKIN, Asst. U.S. Atty., New York, N.Y. (Robert B. Fiske, Jr., U.S. Atty., Richard D. Weinberg, Asst. U.S. Atty., New York, N.Y., on the brief), *for petitioner.*

THEODORE E. TEAL, New York, N.Y. (Paul A. Victor, Dublirer, Haydon, Straci & Victor, New York, N.Y., on the brief), *for defendant.*

NEWMAN, *Circuit Judge:*

The United States seeks a writ of mandamus in advance of trial in this criminal case to challenge the trial court's interpretation of 18 U.S.C. § 3237(b) concerning venue for prosecution of certain internal revenue offenses.

The original indictment charged defendant Michael Clemente and ten others with racketeering, extortion, labor pay-offs, and tax evasion. Ten counts charged Clemente with income tax offenses in violation of 26 U.S.C. §§ 7201 and 7206(2) for the years 1973-1977. Each of the § 7201 counts alleged an attempt to evade taxes by signing and mailing a false income tax return, and the making of these returns was also alleged to be in violation of § 7206(2). The indictment alleged venue in the Southern District of New

York. Relying on 18 U.S.C. § 3237(b),[1] Clemente moved to have the tax counts transferred to his district of residence, the Eastern District of New York. He submitted an affidavit stating that his tax returns for the years in question had been transmitted to the Internal Revenue Service by mail. Clemente's affidavit indicated that the returns were mailed from his residence within the Eastern District of New York to an I.R.S. Office also located in the Eastern District.

The Government resisted the motion, contending that it would establish venue for the tax counts in the Southern District of New York on the basis of the preparation of the tax returns and other acts of

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1 Section 3237 provides:

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided,* That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

evasion in that District.[2] Though the Government contended that Clemente's accounting firm prepared the returns in the Southern District and mailed them to his residence in the Eastern District for signing, it represented that neither the mailing of the returns nor of any other items will be used to establish venue in the Southern District. The Government read § 3237(b) to permit the defendant to elect trial of tax counts in his district of residence only when a mailing is used to establish venue elsewhere.

The District Court (Hon. Leonard B. Sand, Judge) granted Clemente's motion to transfer venue for the tax counts to the Eastern District of New York. Judge Sand concluded that the tax counts fall within the statutory definition of an offense that "involves use of the mails" because in fact the mails were used in the course of activity alleged to be unlawful. This broad, though arguably literal, reading of the statute has been accepted by other district courts, *United States v. DeMarco*, 394 F. Supp. 611 (D.D.C. 1975); *United States v. Youse*, 387 F. Supp. 132 (E.D. Wis. 1975); see also *United States v. Turkish*, 458 F. Supp. 874, 878 n.5 (S.D.N.Y. 1978); *United States v. Dalitz*, 248 F. Supp. 238 (S.D. Cal. 1965), though the issue does not appear to have been considered by any appellate court.[3] The Government responded with a

2 Unless § 3237(b) applies to this case, it is clear that venue for tax offenses is properly laid in the district in which the returns were prepared. *United States v. Gross*, 276 F.2d 816, 819-20 (2d Cir.), *cert. denied*, 363 U.S. 831 (1960). Since the Government seeks to establish venue in the Southern District because the allegedly fraudulent returns were prepared there, we have no occasion at this point to consider what other acts of evasion might also suffice to establish venue.

3 On two occasions footnotes to opinions of this Court have stated that a taxpayer charged with income tax evasion outside his district of residence may elect, by virtue of § 3237(b), to be tried in the district in which he was residing at the time of the alleged offense. *United States v. Slutsky*, 487 F.2d 832, 839 n.9 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974); *United States v. Gross*, 276 F.2d 816, 820 n.1 (2d Cir.), *cert. denied*, 363 U.S. 831 (1960). Both *Slutsky* and *Gross* upheld venue in the district where the tax returns were prepared, rejecting contentions that venue could be laid only in the district where the return was either signed and sent (*Gross*) or received (*Slutsky*). Neither defendant sought to invoke the transfer option of § 3237(b), and thus this Court had no occasion to consider the scope of the option nor to construe the qualifying phrase "involves the use of the mails."

superseding indictment, which charged Clemente with all of the same offenses, including, in Counts 200-209, the income tax offenses; as redrafted, however, the tax counts omitted any reference to the mailing of a tax return. Clemente again moved to transfer the tax counts. Judge Sand granted the motion, having previously indicated that § 3237(b) was applicable even if a mailing was not alleged in the indictment. The Government seeks a writ of mandamus to test the trial court's construction.

Section 3237(b) was added to the Criminal Code in 1958, P.L. 85-595, 72 Stat. 512 (1958). It is an exception to § 3237(a), which permits prosecution of continuing offenses in any district in which the offense was begun, continued, or completed. Section 3237(a) also specifically provides that any offense involving use of the mails is within the category of continuing offenses and may be prosecuted in any district from, through or into which the mail moves.

Section 3237(b) provides that for certain offenses a defendant has an option to require prosecution in the district of his residence. The circumstances in which the option applies are "where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails

and is an offense described in section 7201 or 7206(1), (2), or (b) of such Code . . . ." Since the tax counts of the pending indictment charge Clemente with violations of §§ 7201 and 7206(2), the availability of the residence venue option depends upon whether these counts charge an offense that "involves use of the mails" within the meaning of § 3237(b).

There are at least three possible interpretations of the phrase "involves use of the mails." Most broadly, the phrase could apply to an offense in the course of which a mailing occurred. More narrowly, the phrase could apply to an offense in which a mailing not only occurred but is also an element of the crime charged.[4] Most narrowly, the phrase could apply to an offense in which a mailing not only occurred but is also the basis on which the prosecution seeks to establish venue.

Since the statutory language does not unambiguously require any one of these three interpretations, it is appropriate to resort to available indications of legislative intent. Chief among these is the "mischief to be corrected," an important guide to statutory interpretation and one that Justice Cardozo relied upon to avoid a reading that would "stick too closely to the letter" of a statute. *Warner v. Goltra*, 293 U.S. 155, 158-59 (1934); see also *In re Letters Rogatory*, 385 F.2d 1017, 1020 (2d Cir. 1967) ("The amendment must be interpreted in terms of the mischief it was intended to rectify.").

4 This second category would presumably include not only offenses where the mailing is alleged in the indictment as an element of the offense but also those where the alleged element, *e.g.*, the attempted willful evasion by means of submission of a fraudulent tax return, was in fact accomplished by mailing the return.

The mischief to be corrected by § 3237(b) was the prosecution of a taxpayer at a great distance from his residence simply because his tax return had been mailed to an Internal Revenue Service office located in a district remote from the taxpayer's district of residence. Congressman Prince H. Preston, who introduced the bill, H.R. 8252, 85th Cong., 2d Sess. (1958), that became § 3237(b), told a House Judiciary Subcommittee hearing of the unfairness of requiring a defendant from Savannah, in the Southern District of Georgia, to defend in Atlanta, in the Northern District of Georgia, solely because the Collector's office was located in Atlanta. Hearings on H.R. 8252 Before Subcommittee No. 4 of the House Committee on the Judiciary, 85th Cong., 2d Sess. 7, 10-12 (Apr. 25, 1958) (unpublished). The Subcommittee also heard similar complaints on behalf of District of Columbia taxpayers required to defend in the District of Maryland because their returns were mailed to Baltimore. *Id.* at 27. Reading the statute to apply only when the prosecution uses a mailing to establish venue in a district other than the district of the defendant's residence fully meets the problem that concerned the Congress.

There are additional indications that Congress did not intend the occurrence of any mailing in the course of an offense to provide the defendant with the option to transfer venue to his district of residence. Congressman Preston told the subcommittee hearing, "The bill would not cover situations where the use of the mails is not an ingredient of

the offense charged."[5] *Id.* at 6. Moreover, both the House and Senate reports observed that "in the type of case covered by this bill, the acts for which the defendant is really being tried are generally committed in the district in which he resides and certainly bear little or no relationship to the place where his tax return is received." H.R. Rep. No. 1890, 85th Cong., 2d Sess. (1958); S. Rep. No. 1952, 85th Cong., 2d Sess. 2 (1958), *reprinted in* [1958] U.S. Code Cong. & Ad. News 3261, 3262. That observation surely excludes a prosecution like Clemente's since the Government is undertaking to prove that his criminal conduct, not the receipt of any mailed item, occurred in the Southern District of New York. There is no indication that Congress intended to give a taxpayer the option to be tried in his district of residence when it is his criminal conduct and not the use of the mails that the Government relies upon to establish venue elsewhere.

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5 This point was made in reference to the original version of H.R. 8252, which established venue solely in the district of the taxpayer's residence, rather than affording the taxpayer an option to transfer to that district. The comment is thus subject to the interpretation that it was made to answer the expressed objection of the Treasury Department that Sixth Amendment problems would be encountered if venue were laid in the district of residence even if no element of the offense occurred there. *See* letter from Dan Throop Smith, Deputy to the Secretary, to Hon. Emanuel Celler (Apr. 23, 1958), *reprinted in* S. Rep. No. 1952, 85th Cong., 2d Sess. 4 (1958), *reprinted in* [1958] U.S. Code Cong. & Ad. News 3261, 3264. Even if Congressman Preston was reponding to this objection, he was nonetheless assuring his listeners that his bill did not broadly cover all offenses in which a mailing occurred. While the bill was amended to make the transfer to this district of residence optional, the key phrase to be construed, "involves use of the mails," is identical in both the initial version of H.R. 8252, on which Congressman Preston testified, and the enacted version. The original and amended versions of H.R. 8252 are set out at 104 Cong. Rec. 13064 (1958).

Furthermore, when Congress selected subsections of §7206 of the Internal Revenue Code to which §3237(b) would apply, it included only subsections (1), (2) and (5), which are the ones where the mailing of a return might otherwise be used to force a taxpayer to defend far from his district of residence. Omitted were subsections (3) and (4); these subsections cover offenses in which some use of the mails might occur, but not a mailing to some distant I.R.S. office where a return is to be filed.

Finally, a construction of §3237(b) that relies upon any mailing in the course of an offense should be rejected because it leads to bizarre results unlikely to have been intended by Congress. In a multi-defendant case such as this, where the Government alleges that the evidence of defendant's racketeering is also evidence of his receipt of unreported income, a transfer of the tax counts to the district of residence would mean that the witnesses would bear the inconvenience and the public would bear the cost of two substantially similar trials, in the event that either all counts against Clemente or only the tax counts against him were transferred. A broad reading of the statute also leads to unintended results in cases involving only one defendant. Consider the defendant who earns unreported income in District A, has his tax return prepared in District A, and files his return in District A because an I.R.S. service center is located there. Under a broad reading of the statute, he could obtain a transfer to District B, his residence, simply because his accountant mailed him his return for signature, even though filing was accomplished by hand delivery. Or a defendant could obtain the same result whenever he could allege that the mails were used in some connection

with obtaining income, even though the item mailed was not the tax return.[6] Thus interpreted, the statute would cover virtually all violations of § 7201. Congress could not have intended this result because it used the phrase, "involves use of the mails," as a modifier to limit the § 7201 violations to which § 3237(b) applies.

We conclude that the "involvement" of the mails that Congress intended was not the bare occurrence of a mailing during the course of the alleged offense. Congress was legislating an exception to a venue statute that permitted the Government to use the fact of a mailing into a distant district to prosecute a taxpayer far from his residence. The exception of § 3237(b) is a shield against that governmental power. It is not a sword enabling the taxpayer to transfer prosecution to his district of residence in cases such as this where the Government seeks to establish venue wholly apart from any use of the mails. The statute does not enable a taxpayer who

6 The dissent suggests that § 3237(b) covers at least a case like Clemente's where the item mailed was a tax return sent to the I.R.S. That mailing originated and ended in Clemente's district of residence, and neither it nor any other mailing is relied upon by the Government to establish venue in the district of prosecution. If the statute's option were available simply because a taxpayer mailed his return to an I.R.S. office within his district of residence, then a further anomalous distinction would have been created by the statute. Of those taxpayers, like Clemente, who are accused of committing acts of evasion in a district other than the district of residence and whose I.R.S. office is located within the district of residence, the ones who mailed the tax return could demand transfer of prosecution to the district of residence, while the ones who saved postage and delivered the return by hand to a nearby office would face prosecution in the district where their acts of evasion occurred. This anomaly further indicates that what triggers the transfer option is not the fact of a mailing nor the nature of what is mailed but whether a mailing is used by the Government to prosecute a taxpayer away from his district of residence.

has violated the law in a district by means other than use of the mails to escape prosecution in that district simply by mailing a letter. We construe § 3237(b) to apply, at most, to tax prosecutions that involve the use of the mails in the sense that a mailing, whether or not alleged in the indictment, is the basis on which the prosecution seeks to establish venue in a district other than the taxpayer's district of residence.[7] Under this construction of the statute, Clemente's motion to transfer venue of the tax counts should have been denied.

We also conclude that this is an appropriate case for the issuance of a writ of mandamus to correct the District Court's construction of § 3237(b). The District Court did not purport to exercise discretion, but felt obliged to transfer tax counts. This transfer was beyond the power created by Congress. Correction by mandamus is especially appropriate here since the United States cannot otherwise secure appellate review of the District Court's ruling. *Cf. Helstoski v. Meanor,* 47 U.S.L.W. 4708, 4709 (June 18, 1979); *United States v. Weinstein,* 511 F.2d 622 (2d Cir.), *cert. denied,* 422 U.S. 1042 (1975).

7 Since in this case the Government does not rely on the mailing of any item to establish venue in a district other than the taxpayer's district of residence, it is unnecessary to decide whether the statute would be available when the Government seeks to establish venue on the basis of any mailing or only on the basis of a mailing to an office of the I.R.S. The latter situation is the one contemplated by Congress, and is the one in which the place where the mailing is received is determined by the convenience of the Government in locating I.R.S. offices, rather than by the defendant's choice in selecting those to whom he wishes to correspond. If, pursuant to § 3237(a), venue could be established by a mailing other than a mailing to an I.R.S. office, it remains an open question whether in enacting § 3237(b), Congress intended to let tax defendants avoid prosecution in a distant district into which they mailed an item, not addressed to the I.R.S.

A writ of mandamus will issue directing the District Court to vacate its order transferring Counts 200-209 of the indictment. In view of the impending trial, the mandate shall issue forthwith.

KEARSE, *Circuit Judge* (dissenting):

Lest we remain lost in the thicket of "bizarre" hypothetical results planted by the majority, let us recall the facts of the case before us.

> The counts on which Clemente has been indicted include five counts of knowingly making and signing false income tax returns in violation of 26 U.S.C. §7206(1), and five counts of using those false returns to evade income taxes in violation of §7201.

The government, relying on the first paragraph of 18 U.S.C. §3237(a),[1] which (irrespective of whether or not the mails are used) allows venue in any district where a crime was committed, continued or completed, has commenced prosecution in the Southern District of

1 Although the government nowhere expressly states on what venue provision it relies, it is clear that it relies on the first paragraph of §3237(a). First, in support of venue in the district in which the returns were prepared, the government cites only cases upholding such venue under §3237(a) (Brief at 8 n.*), *e.g.*, *United States v. Slutsky*, 487 F.2d 832, 839 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974). It does not appear that any other section supports venue on this single fact. Second, the government's brief states: "[I]n the instant case the Government does not rely on the *second* paragraph of Section 3237(a) for venue . . . ." (Brief at 9; emphasis added.)

New York, where Clemente's returns were prepared by his accountant.

Clemente has submitted to the district court an affidavit stating that he believes the returns in question were filed with the IRS by mail.[2]

Section 3237(b) says "Notwithstanding subsection (a), . . .where an offense involves use of the mails and is an offense described in section 7201 or 7206(1)," the defendant has the option of having venue of those offenses transferred to the district in which he resided at the time of the alleged offense.

At the time the returns in question were filed, Clemente lived in the Eastern District of New York, and he has moved to have venue of the tax counts transferred to that district.

In my view, the majority's decision that venue must remain in the Southern District is warranted neither by the language of the statute, nor by its legislative history.

I. THE LANGUAGE OF THE STATUTE

The statute in question here is commonly known as the "continuing offense" statute, 18 U.S.C. §3237 (1976). It provides as follows:

> "(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than

2 Credence is given to Clemente's affidavit by the fact that the original indictment charged that the mails were used as the means for violating the tax statutes.

one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

"Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

"(b) *Notwithstanding subsection (a),* where an offense is described in section 7203 of the Internal Revenue Code of 1954, or *where an offense involves use of the mails and is an offense described in section 7201 or 7206(1),* (2), or (5) of such Code *(whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may* upon motion filed in the district in which the prosecution is begun, *elect to be tried in the district in which he was residing at the time the alleged offense was committed: Provided,* That the motion is filed within twenty days after arraignment of the defendant upon indictment or information." (Emphasis added.)

In the context of the present case there is nothing ambiguous about § 3237. Subsection (a) plainly gives the government certain latitude in choosing the district in which to commence prosecution of any offense that was begun in one district and continued or concluded in another. The two paragraphs of

subsection (a) ensure this latitude regardless of whether or not the offense involves use of the mails. Equally plainly, if the offense *did* involve use of the mails and is one of those enumerated, subsection (b) gives the defendant a limited option to supersede the choice of district given the government under subsection (a). The introductory phrase of subsection (b), "Notwithstanding subsection (a)," is perfectly clear: it requires that the provisions of (b) be applied in spite of any conflicting provision or apparent obstacle found in (a).

The government argues that since it has not relied on mailing to establish venue, we should not allow the transfer merely because mailing is "involved in some way." (Brief at 9-10.) Since it is clear that the government does rely on the first paragraph of § 3237(a) for venue,[3] the argument is, in effect, that the option given a defendant in (b) is not available if the government relies only on the first paragraph of (a).

Thus, instead of "Notwithstanding subsection (a)," the government would have us read § 3237(b) as if it provided "Notwithstanding *the second paragraph of* subsection (a)." Subsection (b)'s introductory phrase as written, however, obviously contains no such limitation.

The majority achieves the equivalent of the amendment contended for by means of a different route. First it finds the phrase "where an offense involves use of the mails" ambiguous because it is broad enough to cover a number of hypothetical constructs. Then, relying on certain legislative history, discussed below, it elects to narrow that phrase, reading it as

3 See note 1 *supra.*

if it provided "where an offense involves use of the mails *and such use is the basis for establishing venue* . . . ."

Given the mailing claimed by Clemente, the applicability of "involves use of the mails" is hardly unclear. While the word "involves" is broad, the use of the mails here is quite obviously encompassed in any reasonable interpretation: the income tax returns which the government contends violated §§ 7201 and 7206(1) were mailed to the IRS. Without doubt the alleged tax offenses here "involved" use of the mails. Indeed, in other cases the government has contended that the phrase "where the offense involves use of the mails . . . *means* the mailing by the taxpayer of his return to IRS." *E.g., United States v. DeMarco,* 394 F. Supp. 611, 614-15 (D.D.C. 1975) (emphasis added). While this may not be all that the phrase means, it is difficult to imagine that it does not include at least the case confronting us, where the defendant's allegedly fraudulent and evasive return is mailed to the IRS.

Given the lack of ambiguity of § 3237(b) in the present case, the majority's resort to the legislative history of the section was unnecessary. Even that history, however, fails to justify the majority's effective modification of the language of subsection (b) in order to countermand the transfer of venue.

II. The Legislative History

As stated by the majority, the chief goal of the enactment of § 3237(b) was to give a taxpayer an option to avoid being prosecuted in a district remote from his home simply because he had mailed his tax return to that district. Section 3237(b) was introduc-

ed as H.R. 8252, 85th Cong., 1st Sess. (1957), by Rep. Prince Preston of Georgia. It was enacted in the form recommended by the Senate and House of Representatives Judiciary Committees. The committee reports recommending its passage focused principally on the problem of distance.[4]

> "Testimony before a subcommittee of the Committee on the Judiciary revealed that under current procedures, defendants in certain tax-evasion and tax-fraud cases are often prosecuted in a judicial district substantially distant from the district in which they reside. This causes a heavy burden upon them which is more appropriately and more easily borne by the prosecution.
>
> * * *
>
> "The committee is of the opinion that too frequently prosecutions are not brought in the defendants' home districts but rather in the district most convenient to the district director of internal revenue. Often that district may be a considerable distance from the defendant's home."

H.R. Rep. No. 1890, 85th Cong., 2d Sess. 2 (1958); *accord,* S. Rep. No. 1952, 85th Cong., 2d Sess. 1-2 (1958), *reprinted in* [1958] U.S. Code Cong. & Ad.

4 The distances which the congressmen discussed in the House subcommittee varied considerably, from the great distances in Texas, to the intermediate distances in Georgia, to the scant 40 miles between Washington, D.C. and Baltimore, Maryland. Hearings on H.R. 8252 Before Subcommittee No. 4 of the House Committee on the Judiciary, 85th Cong., 2d Sess. 11, 12, 27 (Apr. 25, 1958) (unpublished). One representative observed that distance was not a problem in California and another imagined that it was not a problem in New York. *Id.* at 15-16.

News 3261, 3262. The language of subsection (b) as recommended (and enacted), however, contained no geographic or proximity restrictions, as both congressional committees appeared content to recommend giving the transfer option to all defendants:

> "Therefore, the committee is of the view that the defendant should have the right to be tried in the district in which he resided at the time the alleged offense was committed, if he so chooses, and that this should not be a matter of discretion."

H.R. Rep. No. 1890, *supra* at 2; S. Rep. No. 1952, *supra* at 2.

There was no suggestion in either report that the defendant's option to transfer would not be exercisable unless the government relied on mailing to establish venue.[5] The only elaboration on the phrase "involves use of the mails" was the description of the bill as permitting the defendant to have transferred to his home district certain offenses, with the statement that "The offenses covered are *the use of the mails to commit* acts described in sections 7201 . . . and 7206(1), (2), and (5) . . . ." H.R. Rep. No. 1890, *supra* at 1; S. Rep. No. 1952, *supra* at 1. (Emphasis added.)

Notwithstanding this support in the committee reports for interpreting "involves use of the mails" to

5 Indeed, Congress did not allow the government to escape the effect of § 3237(b) by failing to rely on 26 U.S.C. §§ 7201 or 7206(1), (2), or (5). Section 3237(b) provides that the defendant has the venue transfer option whenever the offense is "described in" one of those sections, "whether or not the offense is also described in another provision of law."

apply to Clemente's use of the mails to commit the alleged offenses, the majority reads into subsection (b) the condition that the transfer option is available to a defendant only if the government uses mailing to establish venue, relying on a statement by Representative Preston as follows:

> "The bill would not cover situations where the use of the mails is not an ingredient of the offense charged."

Hearings on H.R. 8252 Before Subcommittee No. 4 of the House Committee on the Judiciary, 85th Cong., 2d Sess. 6 (Apr. 25, 1958) (unpublished) (hereinafter "Hearings").[6] This statement, however, was made in support of Representative Preston's original bill which, instead of merely giving a defendant the *option* to have venue changed to his home district, *made venue in his home district mandatory*.

At the time of the above statement, H.R. 8252 provided that where an offense involves use of the mails,

> "the offense may be prosecuted (1) *only* in the district in which the defendant was residing at the time the offense was committed *if such mail matter has moved through that district* . . . ."

Hearings, *supra* at 26; *see* 104 Cong. Rec. 13064 (1958). (Emphasis added.) This was a vital difference

6 The government's brief in addition quotes the following statement by Representative Preston:

> "' . . . this is only involved where the mails are used in offenses under statutes *where the mailing is an essential element* and where the mailing occurs in his district' . . . ." (Government brief at 16, emphasis therein, quoting Hearings, *supra* at 25-26.)

because the Sixth Amendment to the Constitution gives a defendant the right to be tried in the district in which the crime was allegedly committed. Since the original H.R. 8252 *required* venue to be in the defendant's home district, the Treasury Department had attacked the bill as constitutionally flawed.[7] It was expressly in response to these attacks that Representative Preston stated his view that mailing would be an essential ingredient of the offense charged, and repeatedly cited that portion of the original bill which expressly conditioned venue on movement of the mail through the defendant's home district. For example, the text of Representative Preston's statement surrounding the language relied on by the majority is as follows:

> "[T]his bill, H.R. 8252, as drafted, would provide that where the use of the mails is an ingredient of an offense charged under the sections of the Internal Revenue Code of 1954 as specified in the bill, the defendant *must* be prosecuted in the district in which he resides, *if the mail matter involved has passed through that district.*
>
> "The bill would not cover situations where the use of the mails is not an ingredient of the offense charged. *If t* [*sic*] *the bill attempted to cover such situations, by requiring tha* [*sic*] *defendants be prosecuted in the district of their residence,* although no part of the offense charged occurred there, *the bill would be of doubtful constitutionality in view of the sixth amendment to the Constitution.*"

Hearings, *supra* at 6 (emphasis added); *see also id.* at 3-6, 25-26.

There are many reasons why Representative Preston's statement that mailing must be an essential ingredient for § 3237(b) to apply[8]—and whatever implication may be found therein that the government must rely on mailing for that subsection to apply—should not hold sway.[9] First, Representative

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7 The Treasury Department's letter objecting to the bill pointed out:

> "Article III, section 2, clause 3, and the sixth amendment of the Constitution secure to persons accused of crimes the right to trial in the State and district in which a crime has been committed. It is not clear that, in some instances, the proposed legislation does not contravene these provisions. Indeed, in some instances, venue would seem to be laid in the district in which the accused resides rather than that in which the unlawful act was performed. Consequently, there is a possibility that the proposed legislation would be held null and void with respect to a crime not shown to have been committed in the judicial district of the defendant's residence and in which district the indictment has been returned under the authority of such legislation."

Letter from Dan Throop Smith, Deputy to the Secretary, to Hon. Emanuel Celler (April 23, 1958), *reprinted in* S. Rep. No. 1952, *supra* at 4, [1958] U.S. Code Cong. & Ad. News at 3264.

8 Taken at face value, the supposition that mailing is an essential element of the offenses of tax fraud or tax evasion is meritless. Mailing may or may not be the means of committing the offense. It certainly is not legally essential to its commission. *See United States v. Kimble,* 186 F. Supp. 616, 618 (S.D.N.Y. 1960).

9 The majority concludes that Representative Preston, although responding to the constitutional objection, was nevertheless assuring his colleagues that his bill did not cover all offenses in which a mailing occurred. Whether or not this conclusion is correct, Representative Preston seemed certain that at least any mailing by a defendant of his tax return would be covered:

> "[T]his bill . . . is to serve the large majority of people who mail their tax returns.
>
> "They prepare them, and they would go to the Post Office and mail them in their own district."

Hearings, *supra* at 27.

Preston's view cannot be imputed to Congress as a whole. Even before the bill was amended the Preston view was rejected by at least one member of the House Subcommittee before which he testified. Representative Dowdy, who supported the bill, said, "I do not consider mailing an element in this offense."[10] In addition, neither the House nor the Senate Judiciary Committee reports contained any hint of Representative Preston's view. H.R. Rep. No. 1890, *supra;* S. Rep. No. 1952, *supra.* Most importantly, the constitutional flaw that Representative Preston was addressing was eliminated, as the congressmen decided to make home district venue optional rather than mandatory (Hearings, *supra* at 23-24), and the linguistic underpinning of the Preston cure for the constitutional flaw, *i.e.,* the original condition that the "mail matter has moved through the district," was deleted.

Judicial Interpretation of the Statute

Not surprisingly, in light of the plain, broad language of § 3237(b) and the history of its descriptions and amendments before enactment, every court which has dealt with a timely § 3237(b) motion to transfer the offenses described in §§ 7201 or 7206(1), (2), or (5), has granted the transfer where use of the mails was claimed by the defendant, regardless of whether or not the government relied on use of the mails to establish venue. *See United States v. DeMarco,* 394 F. Supp. 611 (D.D.C. 1975), *petition for mandamus denied without opinion* (D.C. Cir.);

10 Hearings, *supra* at 8. Indeed, Representative Dowdy suggested that reference to mailing be omitted. *Id.*

United States v. Youse, 387 F. Supp. 132 (E.D. Wis. 1975); *United States v. Dalitz,* 248 F. Supp. 238 (S.D. Cal. 1965); *United States v. Rosenberg,* 226 F. Supp. 199 (S.D. Fla. 1964); *United States v. Wortman,* 26 F.R.D. 183, 192 (E.D. Ill. 1960); *United States v. Kimble,* 186 F. Supp. 616 (S.D.N.Y. 1960).[11]

These cases have unanimously rejected the arguments urged by the government here. In *United States v. Kimble,* for example, the government contended, *inter alia,* that the defendant had a § 3237(b) option only if "the indictment alleges use of the mails and residence of the defendant in a district other than that in which the indictment is found." 186 F. Supp. at 617. The court found the government's contention

> "obviously . . . unsound. Charges of the nature here involved can be sufficiently alleged without alleging either the means by which the acts were accomplished or the residence of the defendant at the time they were accomplished. These matters are not elements of these offenses and consequently they need not and are not likely to be included in the indictment or information."

Id. at 618.

Some of the transfers required by § 3237(b) have, regrettably, resulted in inefficiencies. For example,

11 Where the charge has been conspiracy to evade taxes, some courts have held that a § 3237(b) transfer of such charges is not a matter of right, but lies within the discretion of the court, since conspiracy is not one of the crimes listed in § 3237(b). *See, e.g., United States v. Ostrer,* 458 F. Supp. 540 (S.D.N.Y. 1978); *United States v. Turkish,* 458 F. Supp. 874, 878 (S.D.N.Y. 1978). The contrary view was taken in *United States v. Rosenberg, supra,* 226 F. Supp. at 201.

venue as to two defendants charged with falsifying, or aiding another to falsify, the same income tax return has been transferred to the separate home districts of each defendant. *United States v. Rosenberg, supra,* 226 F. Supp. at 200; *United States v. DeMarco, supra,* 394 F. Supp. at 614-18. Transfers have been allowed even though the distance between the defendant's residence and the original forum is small. *United States v. Kimble, supra,* 186 F. Supp. at 616-17 (transfer from Manhattan (Southern District of New York) to Brooklyn (Eastern District of New York)); *United States v. Wortman, supra,* 26 F.R.D. at 191-93 (transfer from East St. Louis (Eastern District of Illinois) to St. Louis (Eastern District of Missouri)). Transfer has been allowed even though it greatly enlarged the distance from defendant's abode to the courthouse: one defendant's residence in the Southern District of Illinois was just 9 miles from the courthouse in the Eastern District of Illinois, the original forum; venue as to that defendant was transferred to the Southern District of Illinois in which the courthouse was 100 miles from his home. The court felt it had "no alternative" but to transfer:

> "The Congress apparently did not provide the courts with discretion in determining the facts or circumstances under which a transfer would be justified; rather, Congress intended that defendants be given the absolute right to be tried for alleged violation of the sections enumerated in paragraph (b) of Section 3237 in the district of their residence regardless of the distance involved."

Id. at 92. Transfers have been allowed as to some of the charges against one of many defendants. *See United States v. Tarnopol,* 561 F.2d 466, 469 (3d Cir. 1977) (86-count, seven-defendant indictment charging mail fraud and other crimes; court noted that tax evasion counts against one defendant had been transferred pursuant to § 3237(b) from Newark, New Jersey, to the Southern District of New York).

More than two decades have passed since Congress enacted § 3237(b), and until now all of the courts have uniformly felt compelled to apply the statute in accordance with the plain breadth of its language. Although none of these decisions is binding on us,[12] they are nonetheless significant, for during this period Congress has evinced no dissatisfaction with the courts' straightforward application of the language. While in many circumstances congressional inaction may be of little significance, since it is permissible to infer that Congress has been completely engrossed in matters other than the section in question, no such inference is warranted here.

In 1966, eight years after enactment of § 3237(b), Congress again turned its attention to this subsection, amending it to add another offense as to which a defendant could opt to be prosecuted in the district of his residence.[13] Between 1958 and 1966, courts

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12 The Supreme Court has never addressed the issue. In the one case in which the issue was presented to this Court, it was not reached. *Abrams v. McGohey,* 260 F.2d 892 (2d Cir.), *denying mandamus in and dismissing appeal from United States v. Abrams,* 166 F. Supp. 509 (S.D.N.Y. 1958) (holding § 3237(b) motion untimely).

13 As enacted in 1958, § 3237(b) applied only to prosecutions for tax evasion under 26 U.S.C. § 7201 and tax fraud under 26 U.S.C. § 7206 (1), (2), or (5). Act of Aug. 6, 1958, Pub. L. No.

had held, *inter alia,* that use of the mails need not be alleged (*United States v. Kimble, supra* (1960)); that the distance between the defendant's residence and the district chosen by the government need not be great (*id.*); that the transfer may even greatly enlarge the distance between a defendant's residence and the situs of trial (*United States v. Wortman, supra* (1960)); and that co-defendants charged with tax fraud with respect to the same return may be transferred to different districts for separate, duplicative trials (*United States v. Rosenberg, supra* (1964)). They had, in short, applied the statute broadly, as it was written.

If these early decisions applying § 3237(b) in accordance with the breadth of its terms were contrary to Congress' intent, surely Congress could have been relied on in 1966 to make the simple adjustment necessary to narrow the statutory language when it was amending that very subsection.

For all of the foregoing reasons I would deny the petition for mandamus.

85-595, 72 Stat. 512. In 1966, Congress amended the statute to extend its coverage to the failure to file a tax return, which is proscribed by 26 U.S.C. § 7203. Act of Nov. 2, 1966, Pub. L. No. 89-713, § 2, 80 Stat. 1108; *see* S. Rep. No. 1625, 89th Cong., 2d Sess. (1966), *reprinted in* [1966] U.S. Code Cong. & Ad. News 3676, 3680-81.

APPENDIX F

UNITED STATES COURT OF APPEAL

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of January , one thousand nine hundred and eighty.

Present:

HON. ELLSWORTH A. VAN GRAAFEILAND
HON. JON O. NEWMAN
HON. AMALYA L. KEARSE

Circuit Judges.

U.S. COURT OF APPEALS
Jan. 4, 1980

In Re: United States of America, Petitioner,	79-3051

A petition for a rehearing having been filed herein by counsel for the respondent,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. Daniel Fusaro
Clerk